Office - Supreme Court, U. S.
FILED
FEB 5 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 94

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR REHEARING.

EUGENE E. HORTON,
Attorney for Respondent,
1009 Alliance Life Bldg.,
Peoria, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 215 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No. 94.

MARY TENNANT, ADMINISTRATRIX OF THE ESTATE OF HAROLD C. TENNANT, DECEASED,

Petitioner,

vs.

PEORIA AND PEKIN UNION RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR REHEARING.

Now comes Peoria and Pekin Union Railway Company, a corporation, Respondent, and respectfully petitions the Court for a rehearing, pursuant to the rules of said Court. Respondent presents in support thereof certain alleged misapprehensions of law and fact in the opinion of the Court, as follows:

I.

The Court has based its opinion in this case upon the rule of *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, that it will be presumed that the deceased was actually engaged in the performance of his duties and was in the exercise of due care for his own safety at the time of his death.

The Court has said, with reference to Tennant, that "It was his duty as a switchman or pin-puller *to stand ahead of the engine* as it moved back out of track B-28, protect it from other train movements, and attend to the switches". The evidence, the Court says, indicates that Tennant must have been killed approximately at the point where the engine began its backward movement "and where he might have been located in the performance of his duties". Since Tennant was run over, the Court must presume also that he had located himself ahead of the engine, either between or upon the rails. There is no evidence in this record that any duty required Tennant, at the time and place of the accident, to be between or upon the rails, so close to the engine that neither the engineer nor fireman could see him when they commenced a lookout in that direction at the time of the movement of the cut. (Rec. 200, 218.)

PLAINTIFF'S TESTIMONY—HARKLESS:

Q. Tennant's job was what in connection with the movement of the train, and his position and location? What did you call him?

A. Well, they called him "pin puller" or "head man" or "head brakeman" or "head switchman".

Q. The work "head brakeman" or "head switchman" or "head man", that doesn't mean the same as we mean with reference to head waiter, that he is over somebody. It simply means he follows the head end?

A. Yes, sir.

Q. And the head end is your engine end?

A. Yes, sir.

Q. In this particular instance, he was the man that would stay closest to the engine?

A. Yes, sir. (Rec. 53.)

CROSS-EXAMINATION OF HARKLESS:

Q. What were his duties?

A. Well, his duties was to be there with the engine to line the switches out when we pulled out of the track.

Q. He had two duties to perform, didn't he, at that time? One being to see that the switches were lined up so the train movement could go out on track 28 and get onto the lead? Wasn't that one of them?

A. That was one of them.

Q. The other duty he had was to keep alert and look out for his own safety? Wasn't that the other duty?

A. Yes, sir.

Q. And when you gave your signal, you assumed that he was following his duties, didn't you?

A. Yes, sir. (Rec. 89.)

DEFENDANT'S TESTIMONY—ENGLAND:

Q. What duties did Tennant have to perform at that time?

A. He had none to perform after he made that first coupling.

Q. He had none to perform with reference to coupling up the track?

A. No, sir.

Q. But after he walked around the engine what duties did he have to perform?

A. He had to go out on the lead and find out whether the switch was lined for us or no, but I never looked back to see which way he went after he left the engine. (Rec. 197.)

DEFENDANT'S TESTIMONY—BONNER:

Q. What were Tennant's duties after he made that first coupling?

A. Stay near the head end.

Q. And do what?

A. Attend to the switches and protect the cut, engine.

Q. Did he have any duties to perform with reference to his own safety?

A. Certainly.

Q. What were they?

A. To take care of himself.

Q. Was there any necessity for him to relay any signals which might be given?

A. Not in this instance.

* * * * *

Q. That train had to go out of that track first through the B-28 divide switch, didn't it?

A. Yes.

Q. And then it had to go through another switch called "B-28 switch"?

A. Yes.

Q. That got it onto the middle lead, did it not?

A. Yes, sir.

Q. Then the engine had—train had to go clear down past the B-41 switch, did it not,—

A. Yes, sir.

Q. —in connection with this movement? And it had to keep on going through the puzzle switch?

A. Diamond.

Q. The diamond switch which is to the north of B-41 switch, and keep going far enough to the north so that the rear end of the cut would clear 41 switch?

A. Get over the switch.

Q. And somebody had to see all those switches were lined?

A. Yes, sir.

Q. *Was that the duty of the pin puller?*

A. *Yes, sir.*

Q. When he went out of sight, that was where he would ordinarily go, was it?

A. Well, that I couldn't say. I don't know where he would ordinarily go because I would be taking care of my business and tying into this cut.

Q. You were usually working down along the length of cars, and not paying any attention to where Tennant went? You were performing your duties, is that right?

A. Yes, sir.

Q. And assumed he was performing his?

A. Yes, sir. (Rec. 232-233.)

The foregoing evidence in this record as to Tennant's duties just before the accident would have required him, while protecting the head end of the cut from other engines, to walk north of the engine along track B-28 to line the various switches discussed by Bonner. Had he done this, it is obvious that he would not have been run over at the place where the blood stains were found. He had from five to ten minutes within which to walk away from this place to perform these duties, but obviously chose to loiter near the cars, where, as the above testimony shows, he had no further duties to perform. Why does the Court disregard this evidence,—the only evidence in the case on the subject, and presume that he was engaged in the performance of his duties, in the exercise of due care, *ahead of the engine*, at the location where the pool of blood was found, approximately at the point where the engine began its backward movement? Necessarily he must have been between or upon the rails, and no one has said that he should perform his duties in this manner, but, on the other hand, that he should observe all care and

caution. We submit that the opinion of the Court, in presuming Tennant to be performing his duties in a prudent manner in the location fixed by the Court, is overcome by the facts of what his duties were and what he was supposed to be doing at the time.

Moreover, the Court has given no attention to the other rules in this record. Rule 702 (Rec. 117) required that a switchman not only was forbidden to go between cars in motion, but must be in position to see signals, and must know that such signals are being understood and obeyed before placing himself in a dangerous position. Yet both Harkless and Bonner have testified that Tennant was out of sight at the time the signals were given for the back-up movement, and hence, under this record, he had first placed himself in a dangerous position without waiting to observe the signal.

The General Rules (Rec. 117) prescribed that employees must exercise care to avoid injury, that they must expect trains to run at any time in either direction, that they must not stand on the track in front of an approaching engine or car for the purpose of boarding the same.

The observance of these rules were part of Tennant's duties. They are facts in evidence, and when considered, together with the other facts as to Tennant's duties, should be convincing that Tennant was not properly performing his duties, as the Court presumes.

Presumptions are indulged in to supply the face of facts, but are never allowed against ascertained and established facts, and when these appear, presumptions disappear. *Lincoln* v. *French*, 105 U. S. 615. In Vol. 31, Corpus Juris Secundum, at page 731, the general rule is set forth that a presumption of law is an inference, which, in the absence of direct evidence on the subject, the law requires to be drawn; that such a presumption will sustain the burden of

evidence until conflicting facts on the point are shown. Where such evidence is introduced, the presumption is *functus officio*, and drops out of sight. If this Court will reconsider the question of whether a presumption exists that the deceased was engaged in the performance of his duties at the place where the pool of blood was found, in the exercise of due care for his own safety, in the light of the foregoing facts to the contrary, it is not believed the Court will permit such presumption to prevail.

II.

The Court has said in the opinion that: "In addition, the evidence relating to the rule and custom of ringing a bell 'when an engine is about to move' warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life." We are certain that the Court has misapprehended the evidence in this record and has chosen to follow plaintiff's unsupported theory in this regard.

Admitting that Rule 30 was in the Rule Book of the company, yet the undisputed evidence in the record is that Tennant was twice told by Keeler, the Assistant Superintendent, that, in switching in the East Peoria yards, engine bells would not be rung under said rule to warn a member of the crew performing Tennant's duties, unless the engineer knew him to be in a position of danger. (Rec. 120-122.) There is no evidence that Tennant had any other idea or understanding about this rule. Harkless himself testified that it was not the practice of Tennant's own crew to ring the engine bells during coupling operations. (Rec.

81.) When cars were pulling out of a track onto the lead, Harkless said that it was not the practice of the engineer of Tennant's crew to ring the bell, except to warn other crews of engines, pedestrians and yard clerks. The members of the crew knew all about the movement. (Rec. 83-4.) There is no evidence in this record which could create a reasonable inference that Tennant was depending on the engine bell to warn him at the time and place in question. The only reasonable inference from the undisputed testimony in the case is that he would not have expected a bell to warn him. He had not notified the engineer that he expected to remain in a place of danger. Moreover, the engineer thought he had gone off down to switch B-41, did not consider him a missing man, did not know him to be in danger. (Rec. 213.) Why does the Court infer that Tennant was depending upon the bell signal, when the established facts in the case are to the contrary?

But the Court has said: "The ringing of the bell *might well* have saved his life." It is readily seen that these are words of surmise and conjecture on the part of the Court. It is established in the record that this was a routine movement, done in the same manner every night, and that Tennant had participated in the work on twenty-four previous nights. He therefore was bound to know that, after the cars were coupled together on track B 28, the engine would shortly pull them north upon the lead. The purpose of the bell was to give warning of an engine movement. Tennant, however, was already warned and advised of the fact that the train would move, and that it would move at any time, without any signals from him. Under the presumption that he was acting in a careful and prudent manner, he was bound to have been watchful and observant of this impending movement. The Court is also asked not to forget the testimony of plaintiff's witness, Harkless,

that the engine never moved without releasing the air, which made a whizzing sound that could be heard a car length away. (Rec. 87-8.) This too was a warning. When the engine, *after releasing its air, commenced* to move, how can it be inferred, under the record, that Tennant did not observe it,—and if he did observe it, the bell, as a warning had become unnecessary,—no longer a part of the train of causation. It is more reasonable in this case to infer that the presumably alert Tennant knew of the backward movement of this train without any bell warning, and hence we must find some other cause of the accident than the failure to ring a bell. The only possible solution lies in the reasoning of the *Toops* case, which is discussed in the following section.

III.

We have pointed out that the Court has based its decision in this case upon a presumption that the deceased was engaged in the performance of his duties, standing in front of the engine, in the exercise of due care for his own safety, and also an inference that the ringing of the bell might well have saved his life, although both said presumption and inference run contrary to the undisputed evidence. The Court has then referred to other inferences which were emphasized by the court below, and states that these all suffer "from the same lack of direct proof as characteristics the one adopted by the jury." The Court then went on to say: "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." We are unable to perceive in what respect the circumstantial evidence was conflicting. There was no conflict in the testimony of Keeler, who said that he

had found a bit of flesh on the outside rim of the north wheel on the third car from the engine, and that there was no evidence of blood or flesh on the wheels of the Diesel engine, nor the first and second cars from the engine. (Rec. 138.) There is no dispute in the testimony of Thornberry, that the first blood mark on the rail was 317.6 feet south of the B-28 switch (Rec. 113), which was one of the switches Tennant was supposed to attend. These facts, duly established by evidence in the record, support other inferences as to the cause of death. Since there was no conflict as to said evidence, it *is* the function of the Court to search the record and consider them, particularly where the presumptions adopted by this Court are at variance with the established facts.

In *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 53 Sup. Ct. 391, this Court has said that where proven facts give equal support to inconsistent inferences, and neither are established, judgment must go agains the party upon whom rests the necessity of sustaining one of these inferences before he is entitled to recover; that an inference will be precluded where it appears from the evidence that the facts sought to be inferred did not exist. This Court went on to say in that case:

> "We think, therefore, that the trial court was right in withdrawing the case from the jury. It repeatedly has been held by this court that before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed'. * * *
>
> "Leaving out of consideration, then, the inference relied upon, the case for respondent is left without any substantial support in the evidence, and a verdict in her favor would have rested upon mere speculation and conjecture. This, of course, is inadmissible."

The Court has twice mentioned *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, 281 U. S. 351, in the opinion, yet not for comparison as to its facts with the case at bar. That case is almost on all fours with the instant case, although considerably stronger for the plaintiff. There was evidence in the Toops case of the violation of two rules, one requiring that a flagman be placed on the front of a leading car being pushed by an engine, for the purpose of signaling the engineer in case of need, and also that a white light be placed on the leading car at night. The proof was that no flagman and no light were on the leading car; that there was no warning signal by bell or whistle. Cars were kicked in this manner down a track toward which the deceased had gone. The desired inference in that case was that the deceased was run over while crossing the track in front of these unguarded cars. The Court used the *Looney* case for the purpose of raising a presumption that deceased, knowing that the cars would be moved on that track, proceeded with due care, and therefore was not run over while crossing the track in front of the cars. The circumstantial evidence was that there were no marks of blood or flesh on any part of the leading car, although such marks were found on the following cars. Therefore, the Court concluded:

> "What actually took place can only be surmised. Whether he was run down on the track by the first car, or he attempted unsuccessfully to board the train on one side or the other, or succeeded, and in either case, finally came to his death by falling under or between the moving cars, is a matter of guesswork."

The Court elsewhere held in the *Toops* case:

> "But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employer's Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause, and the case must

be withdrawn from its consideration, unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer * * *.

"Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death * * *.

"If allowed to sustain the verdict, it would remove trial by jury from the realm of probability, based on evidence, to that of surmise and conjecture."

If we are here to use the doctrine of the *Looney* case, as it was applied in the *Toops* decision, it would create a presumption that Tennant was *not* waiting improperly between the rails, directly in front of the engine, which he knew would shortly move, out of sight of all crew members, where he could not observe signals. He had no further duties to perform around the cars after the first coupling was made, but the evidence is unmistakable that he elected to remain somewhere about them during the ten minute waiting period, perhaps going to the east side of the cut, unseen by the fireman, who was not looking all the time. (Rec. 217.) Plaintiff's witness Harkless said switchmen sometimes did this. (Rec. 86.) Upon the movement of the cut, is it not the logical presumption that he sought to regain the side of the train upon which signals were being given, from which he himself might perform the duty of giving signals to stop the cut when and where required? In the *Toops* case no blood was found on the wheels of the first car. Here there was no blood or flesh on the wheels of the engine, or the first car, or the second car. The first evidence of the accident was discovered on the north wheel of the third car from the engine. (Rec. 138.) Therefore, as in the Toops case, it is to be inferred that this was the car which ran over Tennant, that he must have fallen in some manner between the second and third cars. There is

no evidence or charge of a defective safety appliance. He may have fallen from the moving cars at the point where the engine previously had been standing, since, as Mr. Justice Murphy has said, the pool of blood was at that approximate point. Whey then does not the rule of the *Toops* case apply, that what actually took place can only be surmised, that this is not a question for the jury?

The foregoing inference that Tennant fell while climbing between the second and third cars is more reasonable than any other presumption or inference in this case. Other possible theories were advanced, but all yield to the evidence of the bit of flesh on the wheel of the third car and the lack of any evidence of an accident on the Diesel engine.

IV.

The Court has decided this case without all the evidence before it. The exhibits were not sent up with the record; and the first notice counsel for Respondent had of this was when he asked the Clerk for the plat of the northern part of the East Peoria yards (Defendant's Exhibit Two), for use in oral argument to the Court. This map would have informed the Court as to the exact track layout, distances, locations of the switches, location of the blood, etc. Other exhibits embraced the complete book of rules of the Respondent, photographs of the tracks, and close-up pictures of the Diesel engine, all of which were pertinent to a thorough analysis of this case.

Conclusion.

In conclusion the Respondent urges that a rehearing and reconsideration of the Court's opinion ought to be granted. This is a case in which a jury should never have been per-

mitted to guess or conjecture that a negligent act of Respondent was the actual cause of Tennant's death. We ask only for the measure of careful review which the Respondent is entitled to receive in this Court of last resort.

Respectfully submitted,

PEORIA AND PEKIN UNION RAILWAY COMPANY, a Corporation,
Respondent.

By: EUGENE E. HORTON,
Its Attorney.

CERTIFICATE OF COUNSEL.

I, Eugene E. Horton, Attorney for the above named Respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EUGENE E. HORTON,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 94.—October Term, 1943.

Mary Tennant, Administratrix of the Estate of Harold C. Tennant, Deceased, Petitioner, vs. Peoria and Pekin Union Railway Company.	On Writ of Certiorari to United States Circuit Court of Appeals for the Seventh Circuit.

[January 17, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

This action was instituted by petitioner, who is the administratrix of the estate and the widow of the deceased Harold C. Tennant, under the Federal Employers' Liability Act.[1] Recovery was sought for the alleged wrongful death of Tennant during the course of his employment as a member of a switching crew in one of respondent's railroad switching yards. The case was submitted to a jury, which returned a verdict in favor of petitioner and awarded her damages of $26,250. The District Court entered judgment accordingly. On appeal by respondent, the court below reversed this judgment after finding that, while there was evidence of negligence by respondent, there was no substantial proof that this negligence was the proximate cause of Tennant's death. 134 F. 2d 860. It held that the District Court should have directed a verdict in favor of respondent or allowed its motion for judgment notwithstanding the verdict. We granted certiorari because of important problems as to petitioner's right to a jury determination of the issue of causation.

Tennant was employed as a switchman in the "41" yard of respondent's switching yards in East Peoria, Illinois. He had worked there for several years and had been attached to the particular five-man switching crew for several months prior to the fatal accident. On the night of July 12, 1940, this crew was engaged in one of its nightly tasks of coupling freight cars and

[1] 35 Stat. 65, as amended; 36 Stat. 291; 53 Stat. 1404; 45 U. S. C. § 51.

removing them from track B-28. The electric Diesel engine used by the crew was brought down from the north through divide switch B-28 and onto track B-28, which extended straight north and south. The front or pilot end of the engine was headed south. There were about twenty cars in various groups on track B-28 at that time; they were to be coupled together and moved northward out of track B-28 to other locations.

In the course of these coupling operations, the engine stopped and started six or eight times, gradually moving southward. After all twenty cars had been coupled, the engine remained stationary for five or ten minutes before the engineer received the back-up signal from Harkless, the foreman. The engineer testified that the engine at this point was standing about five or six car lengths south of switch B-28, a car length approximating forty feet. There was other testimony, however, indicating that the engine was seven or eight car lengths south of the switch. While thus waiting for the back-up signal, the engineer saw Tennant on the west side of the engine placing his raincoat in a clothes compartment beneath the cab window. After putting on a cap and jacket he walked around the north or rear end of the engine and was never seen alive after that.

There was no direct evidence as to Tennant's precise location at the moment he was killed. There was some evidence to indicate that he never walked back on either side of the engine. It was his duty as a switchman or pin-puller to stay ahead of the engine as it moved back out of track B-28, protect it from other train movements, and attend to the switches.

The engine then pulled the twenty cars out of track B-28. The fact that Tennant was missing was first noticed when the engine reached a point some distance north of switch B-28. An investigation revealed blood marks on the west rail of track B-28 some 315 feet, or about seven or eight car lengths, south of switch B-28. There was a pool of blood a foot and a half north of those marks; near by, between the rails, were Tennant's right hand, his cap and his lighted lantern. His body was found at switch B-28, while his head was discovered about fourteen car lengths north and west of that switch. An examination of the engine and cars disclosed only a tiny bit of flesh on the outside rim of the north wheel of the third car from the engine. There was no evidence

of his having slipped or fallen from any part of the engine or cars.

The case was submitted to the jury on the allegation that Tennant's death resulted from respondent's negligence, in that its engineer backed the engine and cars northward out of track B-28 without first ringing the engine bell. The failure to ring the bell, which was not disputed, was alleged to be in violation of Rule 30 of respondent's rules for its employees. This rule provides that "The engine bell must be rung when an engine is about to move and while approaching and passing public crossings at grades, and to prevent accidents." There was conflicting evidence as to whether this rule was for the benefit of crew members who presumably were aware of switching operations and as to whether it was a customary practice for the bell to be rung under such circumstances. In addition, respondent placed great reliance on the provision of Rule 32 that "The unnecessary use of either the whistle or the bell is prohibited." This was said to demonstrate that the bell should not have been rung on this occasion.

In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. *Toledo v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." *Galloway v. United States*, 319 U. S. 372, 395; *Atchison, Topeka & Santa Fe R. Co. v. Toops*, 281 U. S. 351. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors.

As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung "when an engine is about to move," it was not unreasonable for the jury to conclude that the failure to ring the bell under those circumstances constituted negligence. This was not an operation where bell ringing might be deemed unnecessary or indiscriminate. As a matter of law, [illegible]

Aerkfetz v. *Humphreys*, 145 U. S. 418, 420; *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, 171. The engine had remained stationary for several minutes, during which the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement. Such a movement, without a warning, was clearly dangerous to life and limb. *New York Central R. Co.* v. *Marcone*, 281 U. S. 345, 349. There was ample though conflicting evidence that respondent's written rule, as well as the practice and custom, required the ringing of the engine bell in just such a situation. We cannot say, therefore, that the jury's concurrence in that view was unjustified.

The court below erred, however, in holding that there was not sufficient proof to support the charge that respondent's negligence in failing to ring the bell was the proximate cause of Tennant's death. The absence of eye witnesses was not decisive. There was testimony that his duties included staying near the north or rear end of the engine as it made its backward movement out of track B-28. The location of his severed hand, cap, lantern and the pool of blood was strong evidence that he was killed approximately at the point where the engine began this backward movement and where he might have been located in the performance of his duties. To this evidence must be added the presumption that the deceased was actually engaged in the performance of those duties and exercised due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488; *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, *supra*, 356; *New Aetna Portland Cement Co.* v. *Hatt*, 231 F. 611, 617. In addition, the evidence relating to the rule and custom of ringing a bell "when an engine is about to move" warranted a finding that Tennant was entitled to rely on such a warning under these circumstances. The ultimate inference that Tennant would not have been killed but for the failure to warn him is therefore supportable. The ringing of the bell might well have saved his life. The jury could thus find that respondent was liable "for . . . death resulting in whole or in part from the negligence of any of the . . . employees."[2]

[2] See note 1, *supra*.

In holding that there was no evidence upon which to base the jury's inference as to causation, the court below emphasized other inferences which are suggested by the conflicting evidence. Thus it was said to be unreasonable to assume that Tennant was standing on the track north of the engine in the performance of his duties. It seemed more probable to the court that he seated himself on the footboard of the engine and fell asleep. Or he may have walked back unnoticed to a point south of the engine and been killed while trying to climb through the cars to the other side of the track. These and other possibilities suggested by diligent counsel for respondent all suffer from the same lack of direct proof as characterizes the one adopted by the jury. But to the extent that they involve a disobedience of duty by Tennant no presumption in their favor exists. Nor can any possible assumption of risk or contributory negligence on Tennant's part be presumed in order to negate an inference that death was due to respondent's negligence.

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. *Washington & Georgetown R. Co.* v. *McDade*, 135 U. S. 554, 571; 572; *Tiller* v. *Atlantic Coast Line R. Co.*, *supra*, 68; *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to

enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case. We accordingly reverse the judgment of the court below and remand the case to it for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON concur in the result.

Mr. Chief Justice STONE and Mr. Justice ROBERTS are of opinion that the judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.